

Völkerrechtsblog

Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

≡ Navigation



DISCUSSION

Why Proportionality struggles when it comes to Power

MICHAEL GOLDHAMMER — 10 June, 2015



Testing proportionality appears to be a thoroughly theorized method for legal problems of all kinds. It pervades domestic, European and international law, and the Treaty of the EU even extended this principle to matters of competences by Article 5 (4) TEU (see already Article 3b [3] EC Treaty).

Accordingly, Advocates General and courts have begun to rely more often on proportionality in powers cases, recently for instance in the OMT-case where a judgment is expected to be published next week. This blogpost agrees to the need for fine tuning of competences but it cautions against a too enthusiastic proportionality strategy. Being part of the

Union's architecture of powers, Article 5 (4) TEU shouldn't be construed in the traditional fundamental rights style, it rather demands a tailored homegrown methodology.

The need for a homegrown methodology of Article 5 (4) TEU

Having been a rather dormant clause in the beginning, courts (see [here](#) para 144 or [here](#) para 51) and Advocates General (see recently [here](#) para 159 [OMT], [here](#) para 123 or [here](#) para 90) increasingly apply Art. 5 (4) TEU, respectively the principle behind. However, and as opposed to its effectiveness in fundamental rights conflicts, proportionality as a tool to deal with competences remains quite toothless in practice.

That is interesting because we would assume proportionality to meet a strong need for fine tuning between conferral of power and "competence creep". Those, however, who are familiar with German Constitutional Law, might remember the longstanding reservations of the German FCC to apply proportionality to matters of competences, because of the supposed inability of competences to be balanced.

The current [OMT-Case](#) illustrates some of these difficulties. While AG Cruz Villalón discusses Art. 5 (4) TEU at length over pages and eventually confirms the ECB's competence, provided that it meets the proportionality requirements, the [referring FCC](#) relies on a sharp distinction between monetary and economic policy and avoids proportionality. No matter whether these differences are about methodology or strategy: proportionality as a tool to deal with competences is in any case worth to be considered more closely.

The Principle's Unique Function and Conditions

Put in simple terms, proportionality consists of two components: there is a one-dimensional testing of the means and a multidimensional balancing of goods.

Assessing the means is for the most part a fact-based question, referring to its suitability and necessity to reach a goal. Balancing, in turn, relates two or more values. Establishing this relation is crucial for the balancing procedure because it creates knowledge we otherwise would not have. To give an example: Serious physical harm to a ten year old boy to keep him from stealing chewing gum sounds disproportionate. The same happening to a grown-up intending to commit a bombing attack in a crowded mall tends to be fairly balanced. At the outset however, we can't value "physical integrity" in itself or only at a very high – and therefore useless – level of abstraction. It is at first place only the relation between weight and counter-weight which enables us to approach its meaning.

Proportionality and Competences

Notwithstanding its merits, proportionality is a demanding tool. It will deny its service if it is not fed with sensitive facts and competing values and it will leave us with misleading proportionality rhetoric if not operated carefully.

Let's start with the factual component. The more complex and general political decisions are, the less courts are able to scrutinize these decisions. The discussion of the means, the alternatives, their functioning, and likeliness etc. rightly ends in acknowledging broad discretion of the respective bodies (e.g. [here](#) para 68 or [here](#) para 173, 187). To be sure, we know

this effect from the fundamental rights discourse, but that does not spare us from being aware of proportionality's vulnerability also in the context at hand.

This point will become more serious, however, if we consider the low degree of sensitivity of competence matters to proportionality. When broad goals are at stake and competences are defined purposeful – as they regularly are in EU-Law – proportionality seems to ask the wrong question. Means and ends are conceptually entwined here. We observe this effect when it is not just about some level of protection of consumers, but a high level ([here](#) para 43); when it is not just about harmonizing health and safety of workers, but moreover about maintaining improvements ([here](#) para 66); or when strict requirements are (is anybody surprised?) deemed more effective than less strict ones ([here](#) para 55 or [here](#) para 34).

To be sure, that is perfectly fine! The Union shall perform its powers. The point is, we should not expect proportionality to decide every edge case.

Much worse, the tag “proportionate” applied to those cases carries a misleading normativity. It sounds like: “Look, it's even proportionate!” and thereby perverts the function of proportionality to limit existent power and not to (never!) save shaky reasoning. We see this type of reasoning by the Parliament in the case of ENISA ([here](#) para 38 and 39), and some might hear such a (superfluous) sound in [OMT](#) when there is a close rhetoric connection between the competence and the exceptional circumstances.

Finally, where do we end up with balancing and the quest for values? Generally, competence is a formal concept: either

you have it or you don't. To squeeze it into terms of value means to be challenged by a blur of categories, because the impaired counter-good now stands on both sides of the scale: when the Union exercises power according to the law, it potentially impairs Member States' autonomy. In the absence of a "counter-good", however, and with regard to the mentioned limitations regarding the facts, the significance of proportionality will not surmount the level of a loose rational basis test (which is fine as long as it is stated openly). Therefore, the AG in OMT is right when he avoids weighing diffuse competence-values in his three-step test. On the other hand, why did he not just skip this step completely? The reasoning there, including the point about insolvency and quantitative limits, is in essence part of the previous necessity and suitability test. Sure, steps and methods are not carved in stone, but if there is to be any effective "weighing" step at all, we need a commitment to weighable values, like Member States' autonomy or sphere (e.g. here para 37 or here para 130), constitutional identity (e.g. here para 74) or fundamental rights. Facts themselves, if not referred to such a value, cannot be weighed in terms of proportionality.

From Receptor to an Originator

The mentioned problems are not to discourage proportionality review in the realm of competence. In contrast, we have to be aware that this well-known principle in effect is entering terra incognita there and needs adjustments. Let me propose three points to this end:

First, in delineating competences, conducting a proportionality test will never be as effective as in traditional contexts. To be sure, there is an intersection of formal

competences and substantial proportionality. As competences are no rights, it is definitely a limited one.

Second and to become more precise, courts should move from a toothless, deferential substantive testing of the facts to a procedural scrutiny of fact-findings. GA Cruz Villalón is therefore right in OMT to declare a detailed statement of reasons and facts as the very premise of proportionality (see [here](#) para 165 and already [here](#) para 53; similar strategy of FCC [here](#) para 335).

Finally, we need a discussion about the existence and shape of Member States' goods, like the aforementioned autonomy or identity. Courts hardly discuss this crucial question. That's appropriate in contexts of general rulemaking activities. The more values there are to be considered or the higher their level of abstraction is, the more will weighing lose its significance. Remember only the mentioned example of "physical harm", compare it with the bulk of physical damages caused by road traffic and see how balancing changes its style. An infringement procedure against Germany may serve as a counter-example. The Court missed a perfect opportunity there to apply full proportionality when it formalistically relied on a "system for distributing powers" ([here](#) para 56) instead of using the high density of facts and the concreteness of impairment that may be caused by local audits (see also [here](#) para 90 as opposed to [here](#)). In such a case, we need not make conjectures about the idea of a Member State's integrity as a concept because we know the circumstances, we can investigate the reasons and consequences. If that is not possible, in turn, proportionality will fall short of the expectations.

The pervading language of proportionality and its effectiveness seem to function asymmetrically. What has been proposed here to deal with this imbalance, means to shift from a strong fundamental rights analogy towards proportionality as part of a smart interplay between formal and substantial tools to operate the Union's architecture of power.

Dr. Michael Goldhammer, LL.M. (Michigan), University of Bayreuth; a longer version of the argument will be published in: B. Baade, S. Ehricht, M. Fink, R. Frau, M. Möldner, I. Risini & T. Stirner (eds.), Verhältnismäßigkeit im Völkerrecht (2016).

ISSN 2510-2567

Tags: EU, OMT, Proportionality, TEU



Print



Facebook



Twitter



Email

Related

Awakening dormant law
19 November, 2015
In "Discussion"

The UK's Potential Withdrawal from the ECHR
17 December, 2014
In "Symposium"

Towards an Integrated, Predictable and Coherent International Legal System: A Defence of Proportionality Balancing
10 August, 2015
In "Discussion"

PREVIOUS POST



The struggle for legislative powers

NEXT POST

Die schwierige Aufgabe der Humanisierung des
humanitären Völkerrechts:



No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.

